

SS-8 Determination—Determination for Public Inspection

Occupation

02OFF Marketing Intern

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes

I have read Notice 441 and am requesting:

☐ Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"☐ Delay based on an on-going transaction☐ 90 day delay**For IRS Use Only:****Facts of Case**

The worker is seeking a determination of worker classification for services performed as a marketing intern for the firm from May 2019 until August 2019. The worker received a 1099-MISC from the firm for 2019. The worker feels that they were misclassified because the firm determined when and where they would work, the worker received training from the firm's employees, work was integrated into business operations, the worker had to perform services during set hours on the firm's premises, the worker was paid hourly, and the worker didn't advertise services to the public. The worker provided a copy of the written agreement between the parties.

The firm states that it provides infrastructure opportunities to communities. The worker was requested to provide services as a marketing and communications intern. The worker's job duties included drafting and sending blasts and merges over online platforms and social media, as well as providing graphic design services. The firm states that the worker was an independent contractor due to the contract between the parties stating that the worker would provide services as a contractor for a duration of 3 months. The firm states that they did not control how the work was done and the worker could perform services from home using their own laptop. The firm attached a copy of the contract and an email exchange between the parties.

The firm states that the worker was provided access to the firm's accounts to use for the creation or updating of materials and websites. The worker received job assignments verbally and through emails. The firm states that the worker determined the methods by which job assignments were performed. The firm states that if the worker was unable to complete the job, they would find another contractor that was able to complete the work duties. There were no reports required of the worker. The firm states that the worker performed most of the work during the firm's regular business hours, but the worker had flexibility regarding hours and working over the weekend. The worker performed services between the firm's premises and their home, and the worker was paid a higher hourly rate to perform services at the firm's premises due to easier communication. The worker was not required to attend any meetings, but the firm required the worker to perform services personally. Helpers and substitutes were not applicable to the situation. The worker states that the firm provided them with specific training on their job tasks as well as guidelines for creating and disseminating marketing materials. The worker states that they were forwarded an employee handbook upon acceptance of the terms of the work relationship and provided a copy of this handbook. The worker received job assignments daily from the firm's management or team. The worker and firm's management cooperatively determined how job tasks were performed. The worker was required to contact the firm's management for problem resolution. The worker states that they could not provide examples of reports due to a confidentiality agreement between the parties. The worker would arrive for work at 8:30am, resume any previous-day tasks, and update/report to management once done. The worker would research content for social media, create and update marketing materials/websites, and participate in meetings. The worker would leave at 4:30pm. The worker performed services 95% of the time at the firm's premises and 5% of the time at home if there were extenuating circumstances. The worker was required to attend staff meetings, monthly meetings, project research meetings, e-mail blast meetings, and event coordination meetings. The worker was required to perform services personally. The firm's management was responsible for hiring and paying any helpers needed.

The firm states that they provided the worker with a desktop and marketing/ graphic design subscriptions. The worker provided a laptop and personal programs. The worker did not lease any space, facilities, or equipment. The worker's expenses were their laptop, personal programs, phone bill, and travel expenses. The firm paid the worker an hourly wage with no access to a drawing account for advances. Customers paid the firm for services provided. The firm did not carry worker's compensation insurance on the worker. The worker faced no economic loss or financial risk during their job duties. The firm states that the worker established the level of payment for services provided. The worker states that the firm provided a desktop computer, chair, badge, shelf, desk, and occasional lunch. The worker provided a phone, car, and office stationery. The worker had to borrow a work badge normally reserved for full-time employees. The only expenses incurred by the worker are related to transportation. The firm and worker negotiated a higher hourly wage in response to the transportation costs. The worker states that the only financial risk they faced was a loss of wages. The worker states that the firm's management determined the hourly wage for the worker's services.

The firm states that the relationship between the parties could be terminated by either party without liability or penalty. The firm states that the worker provided similar services for other firms during the work relationship and did not need approval from the firm in order to do so. There were no non-compete agreements in place between the parties. The worker was not a member of a union and did not advertise their services to the public. The firm states that they did not represent the worker to the customers of the firm. The work relationship ended when the contract ended. The worker states that there were no benefits offered by the firm. The worker did not perform similar services for any other firm during the work relationship. The worker states that the firm provided instructions and guidance regarding putting together all marketing materials and products. The

Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Therefore, a statement that a worker is an independent contractor pursuant to a written or verbal agreement is without merit. For federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of the contract (oral or written) between the parties. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the firm's needs, required the worker to report on services performed, and assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

Payment by the hour, day, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings. In this case, the worker did not invest capital or assume business risks. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. Based on the hourly rate of pay arrangement the worker could not realize a profit or incur a loss.

Factors that illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship; and whether the services performed are part of the service recipient's regular business activities. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of the firm's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker to the degree necessary to establish that the worker was a common law employee, and not an independent contractor operating a trade or business.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.